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No. 739

In the Supreme Court of the United States

OCTOBER TERM, 1958

ROBERT G. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 53-60) is reported at 261 F. 2d 809. The unreported opinion of the District Court appears at pp. 16a-17a of the appendix to the record in the Court of Appeals, copies of which are on file in this Court.[1]

[1] The opinion of the District Court in the original criminal contempt proceeding out of which the instant proceeding (under 28 U.S.C. 2255) arose is reported at 117 F. Supp. 685, and the opinion of the Court of Appeals affirming the contempt conviction (pp. 3a-14a of the appendix record) is reported at 214 F. 2d 545. The order of this Court denying petitioner's petition for a writ of certiorari to review the latter judgment (No. 260, Oct. Term, 1954) is reported at 356 U.S. 165.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1958 (Pet. App. 61). The petition for a writ of certiorari was filed on March 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

QUESTIONS PRESENTED

1. Whether, where a defendant in a criminal case appeals his conviction, urging among other things that the evidence is insufficient to support the verdict, and the appeal is unsuccessful, he may thereafter maintain a proceeding under Section 2255 of Title 28, U.S.C., to obtain a second review of the sufficiency of the evidence.

2. Whether the evidence is not, in any event, sufficient to support the finding of fact by the District Court that petitioner had actual knowledge of the order for violation of which he was held in contempt.

3. Whether petitioner was deprived of his right to be confronted by the evidence against him by the fact that the Court of Appeals, on collateral review of the evidence, judicially noted that the entry of the order for disobedience of which he was convicted had been a matter of wide public interest and "front-page news".

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[2] The motion under 28 U.S.C. 2255 which gave rise to this proceeding was combined with a motion under Rule 35 of the Federal Rules of Criminal Procedure seeking the same relief, *viz.*, to vacate and set aside petitioner's conviction and sentence for criminal contempt (Pet. 1; Pet. App. 53). To the extent that the petition for a writ of certiorari seeks review of the affirmance of the denial of the motion under Rule 35, it is untimely, having been filed more than 30 days after the judgment of the Court of Appeals. See *United States ex rel. Coy* v. *United States*, 316 U.S. 342; Rule 22(2) of the Rules of this Court.

STATEMENT

On September 9, 1953, the United States District Court for the Southern District of New York, upon application of the United States Attorney, ordered petitioner, one of the defendants in the *Dennis* Smith Act trial (*Dennis v. United States*, 341 U.S. 494), to show cause why he should not be adjudged guilty of contempt of that court, under 18 U.S.C. 401(3), for disobedience of and resistance to its order of July 2, 1951, directing him to surrender to the United States Marshal for commencement of service of his sentence for violation of the Smith Act (Tr. 219-221).[3] Prior to trial, petitioner was served with "Specifications of Criminal Contempt" (Tr. 215-218). Trial was had on December 8 and 9, 1953, before Judge Noonan, without a jury (Tr. 1-167a). Petitioner was found guilty and sentenced to four years' imprisonment, the sentence to commence upon completion of the three-year sentence previously imposed upon him for violation of the Smith Act (Tr. 272). See *United States* v. *Thompson*, 117 F. Supp. 685 (S.D. N.Y.). On appeal, the judgment of conviction was unanimously affirmed, *United States* v. *Thompson*, 214 F. 2d 545 (C.A. 2), and a petition for a writ of certiorari was denied by this Court on October 14, 1954. *Thompson* v. *United States*, 348 U.S. 841.

On May 27, 1957, this Court granted a petition for a writ of certiorari to review the judgment of the Second

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[3] "Tr." will be used herein to refer to the reporter's transcript of the contempt proceedings and the proceedings under 28 U.S.C. 2255 (the latter being paginated consecutively to the contempt proceedings), a certified copy of which we are herewith lodging with the Clerk of this Court. The petition for a writ of certiorari also makes reference to this transcript.

Circuit (241 F. 2d 631) affirming criminal contempt sentences entered against Gilbert Green and Henry Winston, two of the present petitioner's co-defendants at the Smith Act trial, for refusal to obey the same surrender order for disobedience of which the present petitioner had been convicted of contempt. *Green v. United States*, 353 U.S. 972. On June 4, 1957, the present petitioner, who had at that time completed service of his Smith Act sentence and was serving his contempt sentence, filed in the District Court a motion under Section 2255, Title 28, U.S.C., and Rule 35 of the Federal Rules of Criminal Procedure to vacate and set aside his sentence for contempt (Tr. 288-339a). On June 10, 1957, this motion was heard by Judge Palmieri, who reserved decision on the motion pending the decision by this Court of the *Green* case (Tr. 355-361).[4] On March 31, 1958, this Court affirmed the contempt sentences of Green and Winston. *Green* v. *United States*, 356 U.S. 165. On April 21, 1958, Judge Palmieri filed a memorandum opinion and order refusing to vacate or set aside petitioner's contempt sentence, pointing out that, the *Green* case having been decided by this Court adversely to the positions taken by the petitioners in that case, he was bound by the decision of the Second Circuit upholding the present petitioner's contempt sentence.[5]

On appeal by petitioner, the Court of Appeals for the Second Circuit, on December 2, 1958, by a wholly

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[4] Petitioner was at or about that time released on bail pending decision by this Court of the *Green* case (Tr. 362), and by order of the Court of Appeals is presently enlarged on bail pending final action by this Court on the present petition (Pet. 18, note).

[5] See pp. 16a-17a of the appendix record in the court below, copies of which are on file in this Court.

different panel from that which had affirmed petitioner's contempt sentence on direct review, affirmed (Pet. App. 53-61). The affirmance was based on alternative grounds. The court held, first, that "this appeal can do no more than retest the *evidence upon* which Judge Noonan acted in holding Thompson to have had knowledge of the district court order he disobeyed by flight" and "such re-review of the evidence is not a right to be accorded in this proceeding" (Pet. App. 55). The court also, however, as an alternative basis of decision, reviewed the evidence on which Judge Noonan based his finding of guilt in the contempt proceeding and found it sufficient to sustain that finding. "Nevertheless," the court said, "we have chosen to re-examine the record because the opinions [in the Supreme Court] in the *Green* case do prompt to careful study and because we wish to satisfy ourselves, since the earlier affirmance was by a different panel of this court. And upon such examination we are clear that Judge Noonan's findings find support in the actual testimony before him and the reasonable and rational inferences which he as a trier of facts properly drew from the evidence" (Pet. App. 56).

The facts upon which the contempt conviction was based may be briefly summarized as follows:

In 1949, following petitioner's conviction (with ten other defendants) in the District Court for the Southern District of New York for conspiracy to violate the Smith Act, he was sentenced to three years' imprisonment and to pay a fine of $10,000 (Tr. 20-21). Pending appeal, he was enlarged on a $20,000 bail bond, which he posted on November 3, 1949 (Tr. 23). The recognizance under which he had been released was condi-

tioned *inter alia* upon his "surrender[ing] himself in execution of the judgment and sentence appealed from upon such day as the District Court of the United States for the Southern District of New York may direct, if the judgment and sentence appealed from shall be affirmed" (Gov. Ex. 4; 117 F. Supp. at 686). An order entered on November 10, 1949, extended petitioner's bail limits to the Eastern District of New York, and provided that he "will return to the Southern District of New York whenever ordered by this court so to do" (Gov. Ex. 5; 117 F. Supp. at 686). Petitioner's Smith Act conviction was affirmed by this Court, *Dennis* v. *United States*, 341 U.S. 494, on June 4, 1951, and an application to stay the mandate and continue bail was denied by Mr. Justice Jackson on June 22, 1951 (Gov. Ex. 2; 117 F. Supp. at 686).

On Thursday, June 28, 1951, Harry Sacher, an attorney who represented certain of the defendants at the *Dennis* Smith Act trial, was served with, and on petitioner's behalf accepted service of, a "proposed order on mandate" requiring petitioner and the other defendants personally to surrender on Monday, July 2d, to the United States Marshal for execution of their sentences, together with notice that such order would be presented for settlement and signature on July 2d at 10 a.m. (Tr. 125-126).[6]

On June 29, 1951, subsequent to receipt of the proposed order, Mr. Sacher asked the United States Attorney to consent to postponement of the surrender until after July 4th (Tr. 34-35). This request having

[6] Counsel for the Government and for petitioner stipulated at petitioner's contempt trial that Sacher accepted service of the proposed order and notice of settlement "in behalf of Mr. Thompson as attorney" (Tr. 125).

been denied, Mr. Sacher appeared before Judge Ryan in the afternoon of the same day in connection with certain motions relating to the suspension or staying of the sentences imposed on some or all of the *Dennis* defendants (Tr. 27). All motions were continued until Monday, July 2, 1951, Mr. Sacher stating to the court: "You have my word that all of these defendants will be here at that time" (Tr. 29). Questioned thereafter, on July 3d, concerning the basis of his assurance Mr. Sacher stated that it was "the promise of my clients and the others to appear" (Tr. 34).

After Mr. Sacher left the federal courthouse on the afternoon of June 29, 1951, he went to Communist Party Headquarters, 35 East 12th Street, where he met all of the *Dennis* defendants with the possible exception of petitioner (see *infra*) (Tr. 31-33), and notified them that they would have to appear in court on Monday, July 2d. Respecting this meeting, Mr. Sacher informed the court at the July 3d hearing as follows (Tr. 32):

> The Court: Did you tell them at that time that their presence was required in court yesterday morning?
>
> Mr. Sacher: Definitely. * * * after I had been here on Friday, your Honor, and had made these motions, * * * [I] advised that they all should be present, and I was assured that they would be.

Mr. Sacher testified that his "best recollection" was that he had not seen petitioner at Party Headquarters on the day in question (June 29th), but that he "may have" (Tr. 33). Abner Green, petitioner's surety on his bail bond, who likewise had come that afternoon

from the federal courthouse to Party Headquarters, testified that he saw petitioner and Gilbert Green on the ninth floor of the Party Headquarters (Tr. 122-5).

Petitioner and three of his co-defendants—Winston, Green and Hall—all failed to appear on July 2, 1951 (Tr. 36). On that day Judge Ryan signed the order on mandate, ordering petitioner and the other ten defendants personally to "surrender to the United States Marshal for the Southern District of New York * * * at 11:05 o'clock in the forenoon" of that day (Gov. Ex. 6; 117 F. Supp. at 687). Later that day, following petitioner's default, the court issued a bench warrant for petitioner's arrest, which the Marshal was unable to execute because petitioner could not be located at his given address (Tr. 38-39).

Proof adduced at the trial before Judge Noonan in December 1953 on the criminal contempt charges against petitioner showed that on June 13, 1951, nine days after this Court had affirmed his conviction in *Dennis* v. *United States*, 341 U.S. 494, petitioner had moved from his home to a Manhattan hotel, where he registered as "R. Thompson", but omitting the street from his address and simply stating "3940-LIC., N.Y." (Gov. Ex. 9; 117 F. Supp. at 687). Petitioner was seen in and about the hotel with Henry Winston, who later was to be one of his co-fugitives (Tr. 56), and on Sunday, July 1, 1951, the day before the scheduled surrender date, he was seen leaving the hotel with a person answering Winston's description (Tr. 60-61). Petitioner did not check out, nor did he pay his bill; he left all of his personal belongings there and never returned to the hotel (Tr. 47-48).

When petitioner was apprehended more than two years later, on August 27, 1953, by agents of the Federal Bureau of Investigation (Tr. 74), he was in hiding with another fugitive in a remote cabin in an isolated area of the Sierra Nevada Mountains of California (Tr. 70, 94). He had completely disguised his appearance, had grown a mustache, had dyed his hair, eyebrows and mustache red, and had gained forty pounds (Tr. 43-44, 72-74; Gov. Exs. 8, 11, 15-18). Petitioner had contrived to impersonate a person then deceased, carrying some twelve documents—some of which were forged—identifying him as one John Francis Brennan, an individual who had died in 1938 (Tr. 85-93; Gov. Exs. 20-32). These documents disclosed that petitioner had fled from place to place across the country while carrying on his impersonation of Brennan. Petitioner initially refused to admit his identity upon being arrested (Tr. 75).

Petitioner did not testify or offer any evidence on his behalf at his contempt trial.

ARGUMENT

Petitioner's motion under 28 U.S.C. 2255 is in substance an attempt to obtain a second review of the sufficiency of the evidence to sustain his conviction for criminal contempt following his unsuccessful appeal from that conviction in which he urged the same point. This, as we show below (*infra*, pp. 10-13), is not a legitimate function of a Section 2255 motion. In any event, as two differently-constituted divisions of the Second Circuit have now held, there was substantial evidence to support the contempt conviction (*infra*, pp. 13-14).

The petition for a writ of certiorari should accordingly be denied.

1. The remedy under 28 U.S.C. 2255 was designed as a substitute for the writ of habeas corpus where the petitioner is serving a federal sentence. *United States* v. *Hayman*, 342 U.S. 205. It was not intended to enlarge the scope of permissible collateral attack beyond that which had been traditionally sanctioned by that writ. *Taylor* v. *United States*, 229 F. 2d 826 (C.A. 8), certiorari denied, 351 U.S. 986; *Burns* v. *United States*, 229 F. 2d 87 (C.A. 8), certiorari denied, 351 U.S. 910; *Kreuter* v. *United States*, 201 F. 2d 33, 35 (C.A. 10). Originally habeas corpus could be used to attack judgments of conviction only on grounds of lack of jurisdiction in the convicting court (*Bowen* v. *Johnston*, 306 U.S. 19, 23-24). Although the concept of "jurisdiction" was later enlarged so that the writ reached aspects of a trial which were not strictly speaking "jurisdictional," the enlarged grounds for collateral attack —*e.g.*, denial of counsel, knowing use of perjured testimony, etc.[7]—have been such as undermined the fairness of the trial and thus were inconsistent with due process. "It is plain, however, that the writ is not designed for collateral review of errors of law committed by the trial court—the *existence of any evidence to support the conviction*, * * * and other errors in trial procedure which do not cross the jurisdictional line." *Sunal* v. *Large*, 332 U.S. 174, 179 (emphasis added).

Thus in the *Sunal* case, where a judge erroneously—in the light of a subsequent decision of this Court—prevented a defendant from offering at the trial a valid

[7] See *United States* v. *Hayman*, *supra*, 342 U.S. at 212, fn. 12, where various grounds for habeas corpus are summarized.

defense, the conviction could not be attacked on habeas corpus since the issue was one which should have been raised on appeal. Speaking for the Court, Mr. Justice Douglas said: "If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. * * * Wise judicial administration of the federal courts counsels against such course * * * ." (332 U.S. at 182). Similar in rationale—that the court on collateral attack cannot try issues which should properly have been resolved at the trial or on direct appeal—are the numerous cases holding that, where an indictment on its face purports to charge a federal offense, it cannot be challenged, after conviction, unless it appears from the face that no offense could possibly have been committed. See, *e.g.*, *Goto* v. *Lane*, 265 U.S. 393; *Johnson* v. *United States*, 239 F. 2d 636 (C.A. 6). In short, a collateral examination of the power of the convicting court to render its judgment does not extend to an inquiry into "[m]ere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance * * *." *Frank* v. *Mangum*, 237 U.S. 309, 326; *Matter of Gregory*, 219 U.S. 210, 213; *Harlan* v. *McGourin*, 218 U.S. 442, 447-448.

This principle is as applicable to attempts to impeach collaterally a judgment of conviction on the ground that the evidence is insufficient to support it as it is to other types of collateral attack based on alleged trial error. *Harlan* v. *McGourin*, *supra*. "[T]his court is asked," said the Court in that case (218 U.S. at 445), "to review [on habeas corpus]

the testimony adduced at the trial, with a view to determining the lack of evidence in the record to support the verdict and judgment, although such matters were properly reviewable, and were in fact reviewed, [on writs of error]." "The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge," the Court concluded (at 448), "but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*."

But petitioner contends (Pet. 46-48) that the doctrine enunciated in *Sunal* v. *Large, supra* (*i.e.*, the unavailability of collateral attack for mere errors of law), is inapplicable to a case where the defendant took the route of direct appeal and failed; that the doctrine "was intended to apply only to a case in which the defendant chose to bypass direct review * * * " (Pet. 46). On the contrary, we believe, the principle underlying *Sunal* applies with equal and perhaps *a fortiori* force where the alleged error was unsuccessfully urged, as here, on appeal. For in such a case the effect of allowing the point in dispute to be raised by habeas corpus (or Section 2255) is to permit the writ to be perverted into a permissible *second* appeal, available long out of time. In any event, *Harlan* v. *McGourin, supra*, refutes petitioner's suggestion. For there, as here, the alleged insufficiency of the evidence which this Court refused to permit to be raised on habeas corpus had been "in fact reviewed" in direct review proceedings (218 U.S. at 445).

Thus, the precedents, as well as sound judicial administration, dictate that once a defendant has taken

his cause through normal appellate channels to and including an unsuccessful petition to this Court for a writ of certiorari,[8] he cannot then be permitted to start this chain of procedure over again by urging the same points in the District Court by means of a motion, and perhaps repeated motions, under 28 U.S.C. 2255.

2. In any event, we submit that the evidence is sufficient to sustain the finding by the trial court (Judge Noonan) that petitioner had actual knowledge of the existence of the surrender order of July 2, 1951.[9] That evidence, sketched briefly in the Statement, *supra*, pp. 5-9, is set forth in detail in Judge Noonan's opinion in *United States* v. *Thompson*, 117 F. Supp. 685, which contains the judge's verdict and finding of guilt on the contempt charge and the reasoning by which he arrived at his conclusion from all the surrounding facts and

[8] The substance of petitioner's Section 2255 argument, that the evidence was insufficient to support his conviction of contempt because of alleged failure of proof of knowledge on his part of the entry of the surrender order of July 2, 1951, was fully presented by petitioner in his petition for a writ of certiorari to review the affirmance of his contempt conviction (No. 260, Oct. Term, 1954, pp. 2, 4-22, 39-40).

[9] Petitioner argues that the trial judge rested his finding of guilt in the contempt proceeding on "constructive knowledge" by petitioner of the July 2 order (Pet. 8) and "on the theory that notice of the prospective issuance of the order charged him as a matter of law with knowledge that it was later made" (Pet. 29). On the contrary, Judge Noonan based his finding of guilt on a finding of actual knowledge of the entry of the July 2 order. "[V]iewing the evidence as a whole," he said, "I find that it has been established beyond a reasonable doubt that the respondent Thompson had notice and knowledge of the order of July 2, 1951 made by Judge Ryan and that he wilfully and contumaciously disobeyed the terms of that order" (*United States* v. *Thompson*, 117 F. Supp. 685, 690). The verdict, in short, was based on a finding of fact of actual knowledge inferred from circumstantial evidence—obviously a far different thing from "constructive" knowledge. See *Green* v. *United States*, *supra*.

circumstances. It is again set forth, more briefly, in the opinion below at Pet. App. 56-58. In addition, it was reviewed in our brief in opposition (at pp. 4-8) to petitioner's prior petition for certiorari (No. 260, Oct. Term, 1954)—which, as we have noted, raised substantially this same issue. Accordingly, there is no occasion to re-analyze it here. Suffice it to say that Judge Noonan's finding was based on an inference from many different facts and circumstances which convinced him, as he said, "beyond a reasonable doubt that the respondent Thompson had notice and knowledge of the order of July 2, 1951" and willfully disobeyed it (*United States* v. *Thompson*, 117 F. Supp. 685, 690). Judge Noonan, as the trier of the facts, had the responsibility for making this determination and his finding was supported by substantial evidence, especially when the evidence is viewed, as it must be, most favorably to the Government (*Glasser* v. *United States*, 315 U.S. 60, 80). There is no occasion for further review of this factual question—limited in importance to this single case—by this Court in this collateral proceeding.

3. It is urged (Pet. 39-41) that petitioner was deprived of his "constitutional right to be confronted by the evidence and an opportunity to rebut it" (Pet. 39) by virtue of the comment by the court below that "That order [of July 2, 1951] and its violation was a matter of wide public interest and notoriety, being front-page news for the daily papers, so that Thompson could hardly avoid knowledge if he so desired" (Pet. App. 58). The court by this observation, petitioner says, "supplied the deficiency in proof by considering facts *de hors* the record" (Pet. 39).

Petitioner's attempt thus to construct a constitutional issue from a passing remark by an *appellate* court, on *collateral* review of the evidence supporting a conviction, made after its summarization of the evidence of record on which the trial judge based his verdict, is, we submit, unavailing. The trial judge did not take judicial notice of the fact in question, and it is his determination as fact-finder, as we have noted, that is of primary importance. The court below did no more than to note judicially a further fact, not considered by the trial judge so far as appears, which made his factual finding from the adduced evidence the more probable. "Whether an appellate court will for the first time take judicial notice of a judicially notable fact rests largely in its own discretion." *Mills* v. *Denver Tramway Corporation*, 155 F. 2d 808, 812 (C.A. 10). There clearly was no abuse of discretion here.[10]

[10] Petitioner's contention (Pet. 41-43) that his sentence for contempt was in fact designed to increase his Smith Act sentence and that this violated the constitutional prohibition against double jeopardy was not advanced in the Section 2255 motion, but was first urged (in the current proceedings) on the appeal from the denial of that motion. In any event, like the contention that the evidence fails to support the conviction, it is a repetition of a contention unsuccessfully urged on the appeal from the contempt conviction. See pp. 41-45 of petitioner's prior petition for certiorari (No. 260, Oct. Term, 1954), where this same argument was made to this Court in the proceedings on direct review, and pp. 16-17 of the Government's brief in opposition to the earlier petition, where we replied thereto. For the reasons there stated, the point is, in our view, wholly without substance.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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